

United States Senate

WASHINGTON, DC 20510

July 26, 2012

The Honorable James R. Clapper, Jr.
Director of National Intelligence
Washington, DC 20511

Dear Director Clapper:

As you know, the Senate will be considering legislation later this year that would renew the surveillance provisions of the FISA Amendments Act of 2008, which are currently scheduled to expire in December. You have indicated that reauthorizing this law is a priority for you, so we would like to lay out our views on the issue, in preparation for the coming debate.

The central provision of the FISA Amendments Act (which is now section 702 of the FISA statute) gave the government new authorities to collect the communications of people reasonably believed to be foreigners outside the United States. Because section 702 does not involve obtaining individual warrants, it is incumbent upon Congress to ensure that the government does not use these new authorities to deliberately spy on American citizens.

We are concerned that Congress and the public do not currently have a full understanding of the impact that this law has had on the privacy of law-abiding Americans. In particular, we are alarmed that the intelligence community has stated that “it is not reasonably possible to identify the number of people located inside the United States whose communications may have been reviewed” under the FISA Amendments Act.

We understand that it might not be possible for the intelligence community to calculate this number with precision, but it is difficult for us to accept the assertion that it is not possible to come up with even a rough estimate of this number. If generating a precise estimate would require an inordinate amount of labor, we would be willing to accept an imprecise one. We are not prepared, however, to dismiss questions about how many Americans have had their phone calls or emails collected as trivial or unimportant.

As we have considered the FISA Amendments Act, we have also become increasingly concerned about an apparent loophole in the law that could allow the government to effectively conduct warrantless searches for Americans’ communications. If, as we have noted, the intelligence community has not even estimated how many Americans have had their communications collected under section 702, then it is possible that this number could be quite large. Since all of the communications collected under section 702 are collected without individual warrants, we believe that there should be clear rules prohibiting the government from circumventing traditional warrant requirements and searching through these communications in an effort to find the phone calls or emails of particular Americans.

In situations where the government has a legitimate reason to monitor a particular American, we believe it would be reasonable for the government to get a warrant or an emergency authorization permitting surveillance of that American, so there should be no need for the government to conduct "back door searches" of this nature.

The FISA Amendments Act, as it is currently written, does not contain a prohibition against "back door searches" of communications collected under section 702, and to our knowledge no government officials have suggested that such a prohibition exists. We would like to see this loophole closed before the FISA Amendments Act is extended.

Finally, we believe that given the number of questions that currently exist about this law's privacy impact, the five-year extension proposed by your office is too long. We believe that a shorter extension would give Congress time to get more information about this law's impact on Americans' privacy rights, and consider whether additional privacy protections need to be added.

With that in mind, we ask that you answer the following questions:

- Have any entities made any estimates – even imprecise estimates – about how many US communications have been collected under section 702 authorities?
- Is it possible for the intelligence community to estimate the order of magnitude of this number? (For example, is it closer to 100, or 100,000, or 100 million?)
- To your knowledge, have any wholly domestic communications been collected under section 702 authorities? If so, can you estimate how many?
- Since the FISA Amendments Act does not prohibit searching communications collected under section 702 to find the communications of particular Americans, has the government attempted to search for the communications of specific Americans without a warrant or emergency authorization?

We ask that you provide unclassified answers to these questions, so that Congress and the public can have an informed debate about whether privacy protections in the FISA Amendments Act are adequate or need to be strengthened.

Thank you for your attention to this matter. We look forward to an informed debate on this issue.

Sincerely,

Ron Wyden
William J. Clinton

Mark Udall
Jeffrey A. Merkley

Rand Paul

Mark Begich

Joe Testa

Tom Udare

Maria Cantwell

Chris Coons

Al Franken

Ben Sanders

Steve Daines